NO. 80-275

Supreme Court, U. S.
FILED
OCT 9 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

ROBERT MICHAEL DAVIS AND THE IRVING PROFESSIONAL FIREFIGHTERS ASSOCIATION
Petitioners,

VERSUS

LEWIS WILLIAMS, THE IRVING FIREMEN'S AND POLICEMEN'S CIVIL SERVICE COMMISSION AND THE CITY OF IRVING, TEXAS
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITIONERS' REPLY TO RESPONDENTS' BRIEF IN OPPOSITION

FREDERICK M. BARON
RUSSELL W. BUDD
BARON & COWLEY
8333 Douglas Ave. Suite 1400
Dallas, Texas 75225
(214) 369 - 3605

Counsel for Petitioners

QUESTIONS PRESENTED

Whether certain catchall provisions of a municipal ordinance and of fire department regulations which mandate suspension or discharge of employees for engaging in "conduct prejudicial to good order" are vague, overbroad or otherwise facially unconstitutional.

INDEX

Page

Question Presented i

Citations iii

Applicable Rules, Regulations and Statutes Irving Department of Fire Rules & Regulations 1

Petitioners' Reply to Respondents' Statement of the Case 3

Petitioners' Reply to Respondents' Reasons for Denying the Writ 4

I. The Decision of the Fifth Circuit is Incorrect 4

II. The Issues Involved Justify the Granting of a Writ of Certiorari 4

III. Abstention 6

Conclusion 7

Certificate of Service 8

CITATIONS

Page

CASES:

Bence v. Breier, 501 F. 2d 1185 (7th Cir. 1974) 4, 5

Brown v. Liberty Loan Company, 539 F. 2d 1355 (5th Cir. 1976) 7

Hamtramck Civil Service Commission v. Pitlock, 205 N. W. 2d 293 (Mich. 1973) 4

Kannisto v. City and County of San Francisco, 541 F. 2d 841 (9th Cir. 1976) 5

Marshall v. Soyer, 301 F. 2d 639 (9th Cir. 1962) 7

Moore v. Sims, 442 U. S. 415 (1979) 6

Zablocki v. Redhail, 434 U. S. 374 (1978) 6

Miscellaneous

Field, *Abstention in Constitutional Cases*, 122 U. PA. L. REV. 1071, 1080 - 1084 (1974) 7

Articles

TEX.REV. CIV. STAT. art. 1269m 3, 6

Statutes

42 U. S. C. § 1983 6

NO. 80-275

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

ROBERT MICHAEL DAVIS AND THE
IRVING PROFESSIONAL FIREFIGHTERS ASSOCIATION,

Petitioners,

v.

LEWIS WILLIAMS, THE IRVING FIREMEN'S AND
POLICEMEN'S CIVIL SERVICE COMMISSION AND
THE CITY OF IRVING, TEXAS

Respondents.

PETITIONERS' REPLY TO RESPONDENTS' BRIEF IN OPPOSITION

APPLICABLE RULES, REGULATIONS AND STATUTES
IRVING DEPARTMENT OF FIRE RULES & REGULATIONS

* * * * *

ARTICLE 5.5 OFFENSES

Offenses are punishable by reprimand, reduction in rank, suspension, or dismissal.

A. Offenses

* * * * *

(14) Violation of any of the Rules, Regulations, or Procedures of the Fire Department; Article 1269m V.A.T.C.S.; City of Irving Ordinance 2201; City Ordinances; Personnel Policies and Procedures of the City of Irving; and County, State, or Federal laws.

* * * * *

SECTION 5. . . . The Commission shall make such rules and regulations for the proper conduct of its business as it shall find necessary and expedient, provided that no rules or regulations shall ever be adopted which will permit the appointment or employment of any person without good moral character; or any person unfit mentally or physically; or any person incompetent to discharge the duties of such appointment or employment. Such rules and regulations shall prescribe what shall constitute cause for removal or suspension of Firemen or Policemen, but no rule for the removal or suspension of such employees shall be valid unless it involves one or more of the following grounds:

Conviction of a felony or other crime involving moral turpitude; violations of the provisions of the charter of said city; acts of incompetency; neglect of duty; discourtesy by said

employee to the public or to fellow employees while said employee is in line of duty; acts of said employees showing a lack of good moral character; drinking of intoxicants while on duty, or intoxication while off duty; or whose conduct was prejudicial to good order; refusal or neglect to pay debts; absence without leave; shirking duty, or cowardice at fires; violation of any of the rules and regulations of the Fire Department or Police Department or of special orders, as applicable.

PETITIONERS' REPLY TO RESPONDENTS' STATEMENT OF THE CASE

Petitioners take issue with Respondents' characterization of the issue presented this Court as an academic one. (Respondents' Brief in Opposition p. 2). Fire Department employees of the City of Irving continue to work under the proscription against "conduct prejudicial to good order." Specifically, Article 5.4 A. 14 of the Irving Fire Department Rules and Regulations denominates as an offense, punishable by reprimand, reduction in rank, suspension or dismissal, the violation of TEX.REV.CIV.STAT.ANN. art. 1269m. In turn, Section 5 of Article 1269m authorizes the removal or suspension of a Fire Department employee for engaging in conduct prejudicial to good order. Thus, this impalpable standard continues to work its chilling effect upon the speech of Irving city employees. Respondents' statement that "any real controversy of public importance has left the case" (Respondents' Brief in Opposition p. 2) belies the continuing vitality of this vague and overbroad provision.

Additionally, Respondents note that none of the individuals involved orginally or currently involved in this suit. (Respondents' Brief in Opposition p. 2). Respondents fail to mention, however, that the membership of the Irving Firefighters Association, a co-plaintiff in the Court below and co-petitioner in this Court, will be directly affected by the outcome of this petition and, therefore, continue to maintain an active interest in this controversy.

PETITIONERS' REPLY TO RESPONDENTS' REASONS FOR DENYING THE WRIT

I.

THE DECISION OF THE FIFTH CIRCUIT IS INCORRECT

Petitioner relies primarily upon the reasoning of the dissenting opinion of Judge Rubin in ***Davis v. Williams*** (Petitioners' Brief Appendix p. A-13) and the opinion of the Seventh Circuit in ***Bence v. Breier,*** 501 F. 2d 1185 (7th Cir. 1974), in support of Petitioners' assertion that the decision of the ***en banc*** majority in Davis is incorrect. In the interest of brevity, however, the arguments contained therein will not be repeated here.

Respondents cite several decisions of the Texas Courts involving proscriptions against "conduct prejudicial to good order." (Respondents' Brief in Opposition p. 4). Petitioners would respectfully ask this Court to compare these decisions with those of other jurisdictions striking down similar provisions as unconstitutionally vague and overbroad. e. g., ***Hamtramck Civil Service Commission v. Pitlock***, 205 N. W. 2d 293 (Mich. 1973). These conflicting decisions highlight the need for guidance from this Honorable Court on the question presented.

II.

THE ISSUES INVOLVED JUSTIFY THE GRANTING OF A WRIT OF CERTIORARI

Petitioners again take issue with Respondents' statement that the question presented this Court is merely an academic one. (Respondents' Brief p. 5). The membership of the Irving Firefighters Association, a co-petitioner in this case, continues

to be affected by the City of Irving's vague and overbroad provision proscribing "conduct prejudicial to good order." (See Petitioners' Reply pages 1 and 2).

Additionally, Respondents state that the decision of the Seventh Circuit in ***Bence*** has been "discredited." (Respondents' Brief in Opposition p. 5). Petitioners acknowledge that the opinions of other circuits do indeed conflict with the decision of the Seventh Circuit in ***Bence.*** significantly, the Rules of the United States Supreme Court cite the existence of such conflict as a persuasive reason for the issuance of a writ of certiorari. Thus, Petitioners have no quarrel with this portion of Respondents' Brief in Opposition.

Respondents also note that writ of certiorari was denied in ***Bence***. (Respondents' Brief in Opposition p. 5). However, when Petitioner Bence filed his application for a writ of Certiorari in 1973 there were no Circuit Court decisions directly in conflict on the issue of facial invalidity. Today, the decision of the Fifth Circuit in ***Davis v. Williams*** stands diametrically opposite the Seventh Circuit's decision in ***Bence***. Thus, Respondents' implied argument that writ of certiorari should be denied in this case because writ of certiorari was denied in ***Bence*** simply is not tenable.

Additionally, Respondents cite ***Kannisto v. City and County of San Francisco***, 541 F. 2d 841 (9th Cir. 1976), ***cert. den.*** 430 U. S. 931 (1977), and again imply that this Court's denial of certiorari in that case should serve as a basis for such denial in the case ***sub judice***. (Respondents' Brief in Opposition p. 6). The ***Kannisto*** case, however, did not involve the issue of facial and unconstitutionality. Indeed, the Ninth Circuit held that "since the regulation clearly applies to Kannisto's conduct, he cannot challenge it for facial vagueness." ***Kannisto*** at 845. Thus, the instant petition for writ of certiorari differs significantly from that in ***Kannisto***.

III.

ABSTENTION

Initially, it should be noted that Respondents have taken certain liberties with the chronology of this litigation that are easily rebutted in the record. For example, Respondents allege that "Davis clearly had [an opportunity to present his federal claim in a state proceeding] and did in fact assert his federal claim in the state courts." (Respondents' Brief in Opposition p. 17). This simply is not true.

Appellee Davis was indefinitely suspended by Chief Williams on October 13, 1976. Suit was filed in Federal District Court on October 20, 1976, seeking declaratory and injunctive relief. At the time such suit was filed, ***there was no pending state action on file.*** Davis, pursuant to the Texas Civil Service Act, TEX. REV. CIV. STAT. art. 1269m, did request a review of the Chief's actions before the Irving Firemen's & Policemen's Civil Service Board. However, the Civil Service Board does not have the power to rule on the constitutional validity of its own rules and regulations. Its authority is merely to determine the factual accuracy of the allegations made in support of the disciplinary action. Thus, the line of cases cited by Respondents, culminating in *Moore v. Sims*, 442 U. S. 415 (1979), are not in point. Moreover, the abstention doctrine has never been held to limit determination of claims under 42 U. S. C. §1983. In *Zablocki v. Redhail*, 434 U. S. 374 (1978), this Court stated the issue as follows:

> "Absent issues of state law that might affect the posture of the federal constitutional claims - this Court has uniformally held that individuals seeking relief under 42 U. S. C. § 1983 need not present their federal, constitutional claims in state court before coming to a federal forum."

See also, ***Brown v. Liberty Loan Company***, 539 F. 2d 1355 (5th Cir. 1976); ***Marshall v. Soyer***, 301 F. 2d 639 (9th Cir. 1962) and Field, ***Abstention in Constitutional cases***, 122 U. PA. L. REV. 1071, 1080-1084 (1974).

CONCLUSION

For these reasons, a writ of certiorari should be issued to review the judgment and opinion of the Fifth Circuit.

Respectfully submitted,

BARON & COWLEY
A PROFESSIONAL CORPORATION
8333 Douglas Ave., Suite 1400
Dallas, Texas 75225
214 - 369 - 3605

BY:
FREDERICK M. BARON
RUSSELL W. BUDD

ATTORNEYS FOR PETITIONERS

CERTIFICATE OF SERVICE

I, FREDERICK M. BARON, hereby certify that I served a true and correct copy of the foregoing Petitioners' Reply to Respondents' Brief in Opposition on counsel for all parties to this appeal, by mailing copies thereof by ordinary postage, prepaid addressed to Mr. Donald J. Rorschach, City Attorney, 825 West Irving Boulevard, Irving, Texas 75060, Attorney for Respondents.

Frederick M. Baron

FREDERICK M. BARON